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HAROLD B. WILLEY

# Supreme Court of the United States

October Term—1953

No. 69

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DR. EDWARD K. BARSKY,

*Appellant,*

*vs.*

THE BOARD OF REGENTS OF THE UNIVERSITY  
OF THE STATE OF NEW YORK,

*Respondent.*

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

*To the Honorable, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

Now come Haven Emerson, Paul Klemperer, Leo Mayer and I. Ogden Woodruff, and (555) other physicians licensed to practice in the State of New York, and respectfully move this Court, pursuant to Rule 27, Par. 9 of the Rules of this Court, for leave to file the accompanying brief in this case *amici curiae*. The consent of the attorney for the appellant herein for filing this brief has been obtained. The consent of the attorney for the respondent was requested but was refused.

The interest of the undersigned and their reasons for asking for leave to file the annexed brief on behalf of themselves and the other signators are as follows:

The right of a physician to practice his profession is a right to liberty and property which he may not be denied without due process of law. The court below has construed state legislation to authorize a denial of this right, based upon the appellant's conviction in a federal court for refusing to produce certain records before a Congressional Committee, notwithstanding that such refusal is not crim-

inal under state law and, concededly, did not reflect upon the appellant's professional competence or integrity. We believe as Judge FULD stated in his dissent that "the legislature advances into the individual's constitutional right to liberty and property when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise."

The decision of the lower court is thus fraught with serious consequences for the entire medical profession. We believe, therefore, that this Court will be assisted by the accompanying brief, submitted by a representative group of New York physicians, which sets forth the reasons why, from the point of view of the profession, the important constitutional questions involved in this case should be reviewed.

Respectfully submitted,

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# Supreme Court of the United States

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DR. EDWARD K. BARSKY,

*Appellant,*

*vs.*

THE BOARD OF REGENTS OF THE UNIVERSITY  
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## BRIEF OF AMICI CURIAE

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### Preliminary Statement

The signatories to this brief are all practicing physicians, licensed in the State of New York. They submit this brief, as friends of the Court, in support of the appeal of Dr. Edward K. Barsky from the order of the Court of Appeals of New York, affirming the action of the Board of Regents of that state in suspending his license to practice medicine for the period of six months.

We are motivated in filing this brief by our belief that the decision of the Court of Appeals abridges the constitutionally protected right of physicians to practice their profession. The Court of Appeals reached its decision by construing the laws of New York to permit the suspension or revocation of a medical license for conduct which has no relation whatsoever to professional competence or the fitness of the physician to practice. We are concerned, therefore, both by what we conceive to be an injustice to an

individual member of our profession, and by the long range consequences of the decision upon all medical practitioners. As Judge FULD said in his dissenting opinion "• • • the present decision has an importance that transcends and reaches far beyond this case. And that—its impact over the years—is what so deeply concerns and troubles me" (p. 65).<sup>\*</sup> In that aspect, this case presents constitutional questions of general importance, and of special concern to the medical profession, which should be reviewed by this Court.

In filing this brief, we take no position as to other questions which may be raised on appeal. Nor do we take any position with reference to the aims or objectives of the Joint Anti-Fascist Refugee Committee or Dr. Barsky's activities as its former chairman, except to point out, as Judge FULD stated, that they cast no reflections upon Appellant's character or fitness to practice his profession.

### **Summary of the Facts**

Petitioner's license was suspended by the Board of Regents, acting under the authority of sub-division 2 of section 6514 of the State Education Law. That section authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without the State, of a crime."

The conviction upon which the suspension order was predicated was secured against Appellant for the misdemeanor of "contempt of Congress" under title 2, section 192 of the United States Code by reason of his failure to obey a subpoena of the House Committee on Un-American Activities ordering him to produce books and records of the Joint Anti-Fascist Refugee Committee.

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<sup>\*</sup> All page references to the opinions of the Court of Appeals are to Appellant's Statement As To Jurisdiction where they are printed in full.

As Judge FULD states in his dissent (pp. 60-61), the order of suspension was made notwithstanding the following uncontradicted facts which appear from the proceedings before the Board of Regents:

1. The "crime" of which Dr. Barsky was convicted involved no moral turpitude.
2. In refusing to produce the subpoenaed records, he acted on advice of counsel that the subpoenas were unconstitutional and invalid, an opinion which at that time "was not an unreasonable construction of the law."
3. His refusal to produce the subpoenaed records was motivated, in part, by the fact that they would publicly reveal the names of Spanish Republican exiles and, in his opinion, endanger the lives of their families who resided in Spain.
4. Dr. Barsky's views with reference to the invalidity of the subpoenas and the dire consequences of a public disclosure of the records were honestly held.

Thus, as Judge FULD's opinion states and as the majority of the Court of Appeals tacitly concedes, "the record was barren of evidence reflecting upon appellant as a man or a citizen, much less upon his professional capacity or his past or anticipated conduct toward his patients" (p. 61).

Nevertheless, a majority of the Court of Appeals sustained the action of the Board of Regents. It arrived at this result by giving a literal construction to the words of the Education Law and holding that conviction of *any* crime *anywhere* warrants disciplinary action (including suspension or revocation of a physician's license) notwithstanding the fact that the conviction rests upon conduct which is neither a crime under New York Law or even morally reprehensible in the eyes of the citizens of that state.

## ARGUMENT

**The applicable provisions of the New York Education Law, as construed by the Court of Appeals, violate the due process clause of the Fourteenth Amendment to the Constitution.**

The right of a physician to practice his profession is clearly a right to "liberty and property" which he may not be denied without due process of law. It is a fundamental requirement of due process that a legislative curtailment of the liberty or property of the individual must bear some reasonable and substantial relation to the requirements of the public health, safety or morals.

A legislature may, of course, prescribe qualifications for the practice of medicine. But the qualifications so prescribed must bear a reasonable relation to the fitness of the individual to practice his profession. They must be "appropriate to the calling." *Dent v. West Virginia*, 129 U. S. 114, 122. If they are not, they offend due process because they protect no legitimate interest of the state, but operate arbitrarily to deny a qualified physician the right to engage in a lawful and essential vocation.

In the present case, the Court of Appeals has construed the Education Law to authorize the suspension or revocation of a medical license upon a showing that the practitioner has been convicted of *some* "crime" *somewhere*, irrespective of the nature of the offense or its relation to the fitness of the physician to practice his profession. That court's construction of New York legislation is, of course, binding on this Court. But so construed, the Education Law offends due process since it authorizes the arbitrary denial of the right to practice medicine based upon conduct which has no reasonable relation to the qualifications of the physician.

On the facts of this case, as the Regents' Committee on Discipline found, and as the Court of Appeals in substance concedes, the conduct which resulted in Dr. Barsky's conviction was wholly unrelated to his professional competence or to his integrity as a man and as a doctor. A law which authorizes the suspension of his medical license under these circumstances cannot survive the test of due process. For, as Judge FULD stated in his dissent "the legislature advances into the individual's constitutional right to liberty and property when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise" (p. 62).

Dr. Barsky is threatened with suspension because he took his stand before the Committee on Un-American Activities on matters of personal confidence and assertions of constitutional right, the latter pursuant to the advice of competent counsel. But the consequences of the decision of the Court of Appeals transcend the injustice done to the individual physician before the Court in this proceeding. The decision jeopardizes the license of any physician who, though entirely innocent of wrong-doing by New York standards, finds himself convicted of an infraction of law elsewhere.

As Judge FULD states:

"In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's 'without the state,' if sheer literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's

opinion—‘in some other state (or country) which we in New York consider non-criminal, or even meritorious’.” (p. 64)

Thus, as Judge FULD points out, the Court of Appeals decision would warrant the revocation of the license of a physician who was convicted in a southern state for violating a segregation ordinance, or in Kansas for drinking alcoholic liquor in a public place (p. 64).

The Court of Appeals replies to this demonstration of the arbitrary consequences that flow from its construction of the law with the statement that “some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases” (p. 56). But the very purpose of the guarantees of the Constitution was to substitute the command of law for the “good sense and judgment” of men in matters touching the fundamental rights of life, liberty and property. It does not save the constitutionality of the law to say that the Board of Regents *may not* revoke or suspend a physician’s license on some insubstantial ground. It is sufficient to condemn the law that it *authorizes* the Board to do so. *Bailey v. Alabama*, 219 U. S. 219, 235.

Moreover, the “theoretically possible” case to which the majority alluded was before it in this proceeding. For, as we have seen, it is not contended that the conduct which resulted in Dr. Barsky’s conviction reflected in any way on his fitness to practice. Indeed, counsel for Dr. Barsky urged that the action of the Board of Regents was not only arbitrary but was based on matters that the Board had no authority to consider. But the Court of Appeals refused to examine the merits of this contention, saying:

“As to the assertions by appellants that the Regents dealt too severely with them, or that the Regents, in

deciding on punishment, *ignored weighty considerations and acted on matters not proper for consideration*, it is enough to say that we are wholly without jurisdiction to consider these questions." (pp. 57-58) (Italics supplied.)

As Judge FULD commented, "If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitutional limits" (p. 67).

As practicing physicians, the signatories to this brief have a vital interest in the enforcement of the highest standards of professional competence and personal integrity among members of the medical profession. We have an equally deep-seated concern for the protection of the physician against the arbitrary deprivation of his right to practice. The security of the individual physician and the right of society to his services should be conditioned only on conduct reasonably related to his fitness to practice and "appropriate to his calling". The public welfare requires no more. Constitutional guarantees are satisfied with no less.

### CONCLUSION

**For the foregoing reasons, the undersigned urge the Court to review and reverse the decision of the Court of Appeals.**

Respectfully submitted,

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